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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 1057

LESLIE ANDRE EISENHOWER, a k/a LESLIE ANDRE and LESLIE Y. FORD, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND APPENDIX

WARREN E. MAGEE
745 Shoreham Building
Washington 5, D. C.

LEE R. FENTON
160 Broadway
New York City, N. Y.

Attorneys for Petitioner

April 27, 1964

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND APPENDIX

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, LESLIE ANDRE EISENHOWER, a/k/a LESLIE ANDRE and LESLIE Y. FORD, prays that a Writ of Certiorari issue to review the erroneous decision and judgment of the United States Court of Appeals for the Second Circuit entered below on January 31, 1964.

affirming the judgment of the District Court dismissing Petitioner's complaint for damages under the Federal Tort Claims Act.

THE OPINION BELOW

The Opinion of the United States Court of Appeals for the Second Circuit is printed in the Appendix hereto, *infra*, pp. 1a-2a, and is reported in 327 F.2d 663 (1964).

The Opinion of the United States District Court for the Eastern District of New York was filed on May 6, 1963 and is reported in 216 F.Supp. 803 (1963).

JURISDICTION

The decision and judgment of the Court of Appeals was entered on January 31, 1964 (App., pp. 1a[1]).

The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether the District Court and the Court of Appeals properly and correctly applied the controlling law of the State of New York, where the accident in this case occurred.

2. Whether the Court of Appeals could find, sitting as an Appellate Court, facts not found by the Trial Court in the trial of an action against the United States under the Federal Tort Claims Act, absent a remand to the District Court, for further findings of fact as that Court sat as the trier of the facts without a jury.

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[1] App. refers to the Appendix printed at the end of this petition.

STATUTE INVOLVED

28 U.S.C.A., Sec. 1346, United States as Defendant, provides in applicable part as follows:

> "(b) Subject to the provisions of Chapter 171 of this title, the district courts, together with the United States District Court * * * shall have exclusive jurisdiction over civil actions or claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, for personal injury or death caused by the negligent and wrongful act or omission of any employee of the Government, while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

STATEMENT

Petitioner, LESLIE ANDRE EISENHOWER, a/k/a LESLIE ANDRE and LESLIE Y. FORD, a professional theatrical performer, filed a civil action against the United States under the Federal Tort Claims Act, 28 U.S.C.A. (Sec. 1346) for $200,000.00 in damages for permanent, disabling and painful injuries sustained by her as a USO performer while entertaining United States military and civilian personnel at the Brooklyn Navy Yard, in an accident caused by the negligence of the United States.

In Chambers before trial, Bartels, J., *sua sponte* ordered a separate trial of liability before hearing evidence on damages.

Petitioner alleged in her complaint (A.A. 10-11) that she was "at the Brooklyn Navy Yard in the County of Kings, State of New York, at the request of

the Defendant, its agents, servants, and or employees, for the purpose of entertaining military personnel and civilian employees on duty with the Armed Services of the Defendant".

Respondent, the United States, in its answer (A.A. 12), admitted "that on the 13th day of October, 1958, certain persons were present at the Brooklyn Navy Yard in the County of Kings, State of New York, for the purpose of entertaining military persons and others in the employ of the Defendant".

Petitioner asked of the United States the following interrogatories under Rule 33 (F.R.C.P.) and the United States, under oath, answered them as follows (A.A. 12-13):[2]

"Q. 1. State whether plaintiff Leslie Andre Eisenhower a/k/a Leslie Andre & Leslie Y. Ford was present at the Brooklyn Navy Yard in the County of Kings, City and State of New York on the 13th or 17th day of October, 1958.

A. October 13, 1958.

Q. 2. *State whether Leslie Andre Eisenhower a/k/a Leslie Andre & Leslie Y. Ford was present for the purpose of entertaining military personnel and civilian employees in the employ of the defendant.*

A. *Yes.*

Q. 3. State whether it is recorded at the Brooklyn Navy Yard or elsewhere and brought to the attention of the defendant that *while in the course of entertaining the said military personnel and others in the employ of the defendant, the plaintiff*

[2] A.A. refers to the record on appeal in the Court below.

fell while dancing at the Brooklyn Navy Yard on the 13th or 17th day of October, 1958.

A. It is recorded that plaintiff fell while dancing at the Brooklyn Navy Yard, on the 13th day of October, 1958.

Q. 4. State the construction of the platform or stage on which the plaintiff was dancing *and entertaining military personnel and others in the employ of the defendant.*

A., Wood.

Q. 5. State the finish, *whether it was waxed* or painted or shellacked of the surface *upon which the plaintiff was dancing and entertaining military personnel and others in the employ of the defendant.*

A. *The stage was waxed.*"

(Italics supplied).

No issue of status, i.e., that Petitioner was an "uninvited licensee" or practically a "trespasser" was tendered, and the Pre-trial Order under Rule 16 (F.R.C.P.), provided the "issues" to be tried were those framed by the pleadings (A.A. 12).

On the issues thus framed, the action below was tried by Bartels, J., without a jury. On May 6, 1963, Bartels, J., filed his "findings of fact and conclusions of law" in which he found on his "status theory" Petitioner was an uninvited licensee, that is, practically a trespasser. Bartels, J., found Petitioner proved the following facts (A.A. 4-5):

"This is an action under the Federal Tort Claims Act, 28 U.S.C.A. Sec. 1346, for personal injuries alleged to have been sustained by plaintiff on October 13, 1958, when, as a member of the Gypsy

Markoff Troupe, she fell in the course of her performance as a tap dancer at the United States Navy Receiving Station, Brooklyn, New York. The Gypsy Markoff Troupe was engaged by the U.S.O.[3] and invited by the Secretary of the Army to render certain performance to the military personnel abroad and received invitational orders on October 10, 1958 to proceed on or about October 15, 1958 from New York to various European countries. Before embarking the Troupe requested an opportunity to give a dress rehearsal at the Brooklyn Navy Yard and permission was granted by the Commander of the Third Naval District.

"Prior to October 13, 1958, plaintiff knew that she would appear at the United States Navy Receiving Station in Brooklyn but no contact was made with the defendant by either plaintiff or Gypsy Markoff before the arrival of the Troupe, with respect to the condition of the stage floor, and there was no contract or remuneration for this performance. When the members of the Troupe arrived about 6 P. M., they were escorted to the auditorium, where the stage was lit and the stage floor was in full view, and thereafter to dinner and to the back stage for the purpose of preparing for the performance. There was an opening number about 8:15 P. M., in which all members of the Troupe, including the plaintiff, appeared in a chorus line arrangement in street shoes; thereafter there were individual performances including a Charleston dance. Plaintiff appeared at or near the last number about half an hour after the opening number, wearing leather soled tap dance shoes with aluminum plates on the tips and on the heels. Her dance was in the nature of an acrobatic tap dance involving dancing, ballet swings and acrobatic stunts. *After she had begun to dance and*

[3] United Services Organization.

had completed about thirty or thirty-two spins, she realized that the floor was too slippery and accordingly tried to 'ad-lib'. Thereafter she slipped and fell. She then arose, continued her act and made another appearance in the grand finale. She now claims that she sustained serious injuries from this fall.

"Plaintiff contends that the stage floor was entirely too slippery for tap dancing; that it was negligence on the part of the defendant to wax the stage floor to make it so slippery in view of this type of performance, and that no stage floor upon which tap dancing is performed, is ever waxed or polished." (Emphasis supplied).

Petitioner, a professional theatrical performer with many years of tap dancing experience on stages, qualified as an expert, her expert witness, Mr. Bogard, and the Government's expert witness Libby, all testified and agreed a stage floor for dancing shows is never waxed, should never be waxed, and if waxed constitutes a danger and a hazard to dancers, particularly tap dancers doing dancing involving ballet swings and acrobatic stunts, who have metal plates on the heels and toes of their tap shoes (A.A. 22-23, 54-55, 56, 58, 64, 74-75, 77). In the course of the trial this was actually conceded by the United States! (A.A. 74-75). Bartels, J., made no finding that Petitioner was guilty of "contributory negligence"; or that Respondent was free from "negligence". Instead, he bottomed his findings and conclusions on the "status" of Petitioner and held her to be a "licensee", i.e., almost a trespasser (A.A. 10), hence the "Government had no duty * * * to provide reasonably safe premises" (A.A. 9) and "no duty * * * to provide an unpolished stage floor for plaintiff's tap dance number * * *" (A.A. 9) for the ad-

mitted (A.A. 4, 10) entertainment of military and civilian personnel of the United States, on the stage in the Brooklyn Navy Yard (A.A. 18, 46-48).

While Bartels, J., discussed casually "negligence" and "contributory negligence", his *basic* premise in dismissing Petitioner's complaint is predicated on his opinion that she was an "uninvited" licensee "and was not at the Yard by invitation of the Government or pursuant to any contract with the Government". She thus was a "trespasser", and in no sense an "invitee"[4]. Thus, Bartels, J., held (A.A. 8):

> "The key to the solution depends upon the relationship between the parties".

While Bartels, J. admitted (A.A. 8):

> "Assuming the plaintiff in this case was an invitee, it would be the duty of the defendant to provide a reasonably safe place for the Troupe to perform * * * ",

he held (A.A. 9):

> "she cannot rely upon any stage tradition"

because not being "an invitee" she was not in "a position * * * to assume the risk," hence being (A.A. 9-10)

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[4] Yet the United States stipulated "the performance was pursuant to the order" of the Secretary of the Army (Pl. Ex. 1) (A.A. 18), and when Commander Bryant testified: "Arrangements were made for them to perform their dress rehearsal * * * prior to taking the show overseas" (A.A. 46), the request "through the Third Naval District * * * was granted" and the show entertained "enlisted men and employees of the Navy Yard" (A.A. 46) and the United States furnished their transportation, the United States conceded these showmen were not "trespassers", the District Court forced Commander Bryant to admit it was an "authorized" show. (A.A. 46-48).

"a licensee rather than an invitee" rendering a performance for "the military personnel at the Base" by "permission" that "plaintiff was obliged to take or leave the premises 'as is'" and as there were "not any latent defects" the Government's obligation to the plaintiff was therefore fully performed."

Notwithstanding the finding of Bartels, J., that:

> "Testimony adduced on behalf of the plaintiff (showed) that stage floors are generally unpolished and that a polished stage floor was an unsafe place for the performance of a tap dance number" (A.A. 8),

he found for the United States on the ground that Petitioner was a "licensee", hence under New York law practically a trespasser.

The argument of the United States, and Bartels', J., adoption of it means that professional U.S.O. performers and others, like Bob Hope, Gypsy Markoff, Jane Froman and Petitioner, who, as patriotic Americans in support of the morale of our military personnel, because of performing without remuneration, are not even in the status of "invited licensees" but are, in effect, "trespassers". Should they suffer injuries through the United States' negligence, lo, they must take "the Government's facilities", as Bartels, J. puts it, "as is"! And the injuries to the Fromans, the Markoffs, the Eisenhowers, who gave their services to aid our troops, even in the presence of negligence, become "assumed risks". Thus, falling planes, waxed stages and anything less than "traps" or "latent defects" are on a take-it-or-leave-it "as is" basis for these "trespassers" upon property of the United States. Why? Because they were not on a "remuneration con-

tract basis" (Bartels, J., (A.A. 10)). Thus, "the show must go on" under theatrical tradition in the face of fire, firing, shot, shell, earthquake, explosion, panic, heartbreak and death in the theatre, which makes for this great tradition of the stage, "the show must go on", goes down the drain. All show people, henceforth, in the face of danger, panic, fear, fire, explosion or lesser risks, once they have had "an opportunity to, and did see the condition" (Bartels, J., (A.A. 9)) of danger, must flee, because if they—in the noblest tradition of the stage courageously "carry on", and should be injured, as in an explosion like the recent one at the Ice Show in Indianapolis—continue their act and are injured by falling debris or otherwise in quieting panic and helping the "theatre" to be cleared of panic-stricken and demoralized patrons in the face of death and destruction, even if the explosion was caused by the negligence of the theatre's proprietor, like the United States here, cannot recover because, as the United States argues and Bartels, J. puts it, when a showman "had an opportunity to and did see the condition" (A.A. 9) and faces peril under such a "stage tradition" the showman, if injured, "cannot rely upon any stage tradition to exculpate her from the consequences of her own choice * * *." And whether the showman's bravery or tradifional choice to go on with her professional performance in the presence of danger or a hazard "was reasonable or unreasonable" is "*immaterial.*" (Bartels, J., (A.A. 9)).

Bartels, J., on the evidence adduced should, under New York law, have found for the Petitioner.

REASONS FOR GRANTING THE WRIT

The Court of Appeals disregards the findings of fact of Bartels, J., that Petitioner, "after she had begun to dance and had completed about 30 to 32 spins, she realized that the floor was too slippery and accordingly tried to 'ad-lib'. Thereafter she slipped and fell". In their disregard of this finding of fact, the Court of Appeals found, "Appellant was the one who knew that such a floor was dangerous, saw the condition of the floor to herself before the show started; did not ask anyone in authority to change the condition; did not refuse to do her act under these conditions; and did not use the type of dancing shoes used by other acrobatic tap dancers who performed on waxed floors" and decided the judgment, therefore, of Bartels, J., should be affirmed.

The Court of Appeals also made the following finding which is completely unsupported by the evidence and the findings of Bartels, J.: "Whether Appellant be considered a licensee or invitee, the United States was not negligent". How such a finding could be made, when Bartels, J., found that Petitioner's evidence established "that stage floors are generally unpolished and that a polished stage floor was an unsafe place for the performance of a tap dance", and further found if Petitioner was an invitee, "it would be the duty of the Defendant to provide a reasonably safe place for the Troupe to perform" (A.A. 8).

That the Court of Appeals was aware that the United States was negligent is clear from its statement, "the claim of negligence is based on the *admitted* fact that the stage floor had just been waxed earlier on the date of the performance and such a condition was dangerous

for acrobatic tap dancers". The evidence established that Petitioner, a theatrical performer, was engaged by the United States to perform tap dances as a part of a variety show and invited to do so by the "Secretary of the Army to render certain performances to the military personnel" of Respondent, the United States. The performance at the Brooklyn Navy Yard was for the dual purpose of giving a dress rehearsal and for "the admitted purpose of entertaining military persons and others in the employ of the Defendant" (Answer of the United States, (A.A. 12), and Answer of the United States to Interrogatory #2 (A.A. 12-13)). Under New York law Petitioner was an invitee. Respondent engaged her to perform acrobatic tap dances on its stages in the United States and abroad. Petitioner was doing this as a U.S.O. performer without compensation, as a patriotic duty to support the morale of military personnel of Respondent. Respondent owed her the duty of not creating the hazard it did by waxing a theatrical stage and of furnishing Petitioner with a safe place to work. As Petitioner discovered the danger, under the findings of the District Court, in the middle of her tap dance, she was not guilty of contributory negligence in endeavoring to complete her number as a part of the show, and did not assume the risk of injuries caused by the Respondent's negligence in waxing the stage floor.

Several of the grounds usually considered by this Honorable Court as a basis for Certiorari are present in this case. Both the District Court and the Court of Appeals have refused to follow the substantive and controlling law of the State of New York as required by *Erie R. Co. v. Tompkins*, 304 U.S. 64, and the many decisions of this Court following *Erie*.

In addition, the Court of Appeals has made factual findings unsupported by the record and contrary to the findings of fact of the District Court. This is a flagrant violation of the principles surrounding the trial and decision of claims filed under the Federal Tort Claims Act. Actually, following the controlling decisions in New York on the facts found, because of the erroneous legal status premise upon which the District Court bottomed its opinion, the Court of Appeals should have reversed the District Court and with instructions to find in favor of Petitioner. The decisions below conflict with the law of New York as applied to the facts in this case and with earlier decisions of the Second Circuit construing New York law. *Heskell* v. *Auburn L. H. & P. Co.*, 209 N.Y. 86; *Greenfield Hosp. Assoc.* v. *City of Schnectady*, 258 App. D.C. 352; 16 N.Y.S. 2d 729; *Grant* v. *United States*, 271 F. 2d 651-655 (C.A. 2, 1959); *Kaplan* v. *48th Ave. Corp.*, 267 App. Div. 272 (1943), and many other cases.

The basic question presented is whether the Courts below erroneously interpreted the status of Petitioner, a U.S.O. performer, invited by the United States through its Secretary of the Army to entertain, and while entertaining troops of Respondent, on one of its Federal reservations, the Brooklyn Navy Yard, was an invitee and not a licensee or trespasser as determined by the Courts below.

We say the evidence established Petitioner to be an invitee, hence the United States owed her the duty of furnishing her a safe place for her performance and she did not, in undertaking her performance, assume the risk of the Respondent's negligence.

These questions are important to the entire U.S.O. program now being conducted for the benefit of the

United States. This is a case of first impression and if permitted to stand could disrupt the entire U.S.O. program dealing with the furnishing of entertainment through unpaid professional theatrical persons who give their performances without charge as a patriotic duty in support of the morale of the Armed Forces of the United States. We submit that theatrical professional personnel should no longer furnish such patriotic services if, because they receive no remuneration for these donated professional services, they are to be treated like trespassers on stages of the United States and assume all risks of injury due to the negligence of the United States in the maintenance of such stages.

The decisions below, in the public interest and in the interest of furthering U.S.O. entertainment programs for the military personnel of the United States at home and abroad, should be reversed and this Court should rule under New York law that Petitioner was an invitee of the United States at the Brooklyn Navy Yard. Under the circumstances here involved, she is entitled to recover damages for the injuries she sustained because of the negligence of the United States in waxing the Brooklyn Navy Yard stage. Any other decision would impute to the United States, the greatest user of theatrical talent in the world, for the entertainment of its military personnel, a lack of knowledge as to how stages should be maintained whereon variety shows are to be performed by artists, including dancers.

Moreover, the Court of Appeals' method of reviewing the District Court's findings is contrary to the proper adjudication of claims under the Federal Tort Claims Act in that the Court of Appeals made findings of fact contrary to the findings of the District Court.

I.

The Confusing Situation Arising From the Decisions Below Calls for the Prompt Exercise of This Court's Powers of Supervision and Correction. The Decisions Below Are Not in Accord With, and Are Contrary to the Controlling Law of New York.

The principal question presented as stated by the District Court, is whether Petitioner, a U.S.O. performer, while engaged in putting on a dance for the purposes of a dress rehearsal and for the admitted other purpose of entertaining personnel of the United States at the Brooklyn Navy Yard, was an invitee and not a licensee or a trespasser. Petitioner's evidence established (A.A. 16-18) and the District Court found, that the Gypsy Markoff Troupe, of which Petitioner was a professional theatrical member, was invited by the Secretary of the Army to render performances to military personnel and received invitational orders on October 10, 1958 (A.A. 4). A dress rehearsal and performance of this Troupe was performed at the Brooklyn Navy Yard. This performance was part of the U.S.O. program for the United States. Each U.S.O. show puts on a dress rehearsal and performance for the United States prior to going abroad. Pursuant to arrangements made with the United States through Gypsy Markoff, the Troupe was furnished transportation in a military vehicle to the Brooklyn Navy Yard. The Troupe was met by officers of the United States about 6 P. M., was given dinner at the Yard, met military personnel at a room which appeared to be an officers' club room, and shortly before 8:15 P. M. went to dressing rooms to dress for the performance. The dress rehearsal and performance commenced at 8:15. Military and civilian personnel of the United States witnessed the performance on a stage in the Respond-

ent's facility maintained for show purposes. No remuneration was paid members of the Troupe. As the District Court found, as Petitioner began to dance, and had completed about thirty or thirty-two spins, she realized that the floor was too slippery and accordingly tried to "ad lib". Thereafter she slipped and fell. (A.A. 4-5). The evidence further established that the stage for many years had been supplied by the United States for shows, including U.S.O. shows, given at the Brooklyn Navy Yard for entertainment purposes of the Respondent's personnel. Petitioner so testified as did witnesses for the Government (A.A. 5). Petitioner testified that she had had previous extended experience in putting on U.S.O. shows for the United States and had herself taken two U.S.O. shows from the United States throughout the Orient for the entertainment of military personnel of Respondent (A.A. 90). Based on this experience, Petitioner testified that when U.S.O. shows are engaged by the United States to entertain troops and are to leave the United States for this purpose, such shows for the United States always put on a dress rehearsal and performance before leaving the United States. Government Witness Libby, a man also familiar with U.S.O. shows, testified to the same effect. (A.A. 77-78). Government Witness Bryant, a Commander in the Navy who met and conducted the Troupe throughout the Brooklyn Navy Yard on the evening of October 13, 1958, while she admitted that U.S.O. shows had been put on on this particular stage to entertain personnel at the Brooklyn Navy Yard, so admitted but stated she did not know what the practice was in regard to a final dress rehearsal and performance before such U.S.O. shows did leave to go abroad for the additional purpose of entertaining troops outside the United States. But evidence of this practice

was clear (A.A. 17, 18, 19, 29-30, 34). The use of the Brooklyn Navy Yard for the purpose of this final dress rehearsal and performance for the entertainment of United States personnel was in fact "granted by the Commander of the Third Naval District" and the Court below so found (A.A. 4). Thus, the evidence below established without dispute that the United States acting through the Secretary of the Army, engaged the Gypsy Markoff Troupe, of which the Petitioner was a member, to entertain troops for the United States. Travel orders for these purposes were issued by the Secretary of the Army. The final dress rehearsal before going abroad was held at the Brooklyn Navy Yard for the dual purpose of putting on a dress rehearsal for the United States and a performance for the entertainment of military personnel of the United States at the Yard on a professional stage in the Yard, utilized over the years for these and other entertainment purposes. The performers in the Troupe were volunteering their duties and giving their professional services without remuneration for patriotic purposes as authorized by the United States for the entertainment of military and civilian personnel of the United States.

On this state of facts, none of which were really disputed, Bartels, J., held Petitioner was an uninvited "licensee", which under New York law would in practical effect be a trespasser, at the Brooklyn Navy Yard on the night of this show, and was not an invitee (A.A. 10).

As we pointed out in our Statement, Bartels, J., held that the status of Petitioner while giving her performance to entertain troops at the Brooklyn Navy Yard

was the "key" to the problem and she (A.A. 7), "was a licensee rather than an invitee" (A.A. 10) and consequently was not "such an invitee to say that she had a right to assume the risk". Therefore as such a "licensee there is no question that Petitioner was obliged to take or leave the premises 'as is' ". As "no latent defects" were proven the Government's obligation to the Petitioner was therefore fully performed, hence he entered judgment for the United States, dismissing the action. On this "licensee" premise, Bartels, J. stated the tradition of the stage, "that the show must go on" in the presence of a hazard, in no way helped the Petitioner and applied to her the doctrine that as she was only a licensee, or under New York law a trespasser, she assumed the risk of injury when she endeavored to continue her dance after she found the floor of the stage had been waxed, buffed and was hazardous (A.A. 9-10). Bartels, J. accordingly ruled that when Petitioner in an "ad lib" fashion attempted to complete her number as a part of the performance then being given for the entertainment of the troops at the Brooklyn Navy Yard, which involved "hazards", then the consequences were of her own choosing, citing *Scala* v. *City of New York*, 200 Misc. 475, 102 N.Y.S. 2d 790. (A.A. 7).

We submit the *Scala* case is clearly distinguishable upon the facts. There the plaintiff in a park owned by the City of New York, in which was built a skating rink surrounded by a curb and which had benches throughout the park area, designed for roller skating and ice skating, attempted to play ball, and while doing so fell over a park bench. There was no evidence of any depression, of any defect or any failure to properly maintain this park.

Petitioner in our case under her arrangements with the United States was obligated to put on a performance at the Brooklyn Navy Yard for rehearsal and for entertainment purposes for the personnel there. The performance was for the benefit of the United States and was for the entertainment of military and civilian personnel at the Yard as well as being for dress rehearsal purposes. This Troupe had been practising for a month, for the purpose of entertaining troops at the Yard and overseas. In these circumstances, we submit that Petitioner comes within the definition of an invitee, as defined by the Court of Appeals of New York in *Heskell* v. *Auburn, L.H. & P. Co.*, 209 N.Y. 86.

In the *Heskell* case, the Court of Appeals points out the distinction between licensees and invitees and held (p. 91):

> "The Supreme Court of Massachusetts has formulated a rule potently indicative of the essentials of an implied invitation, if not comprehensive and absolute, as follows: 'To come under implied invitation, as distinguished from a mere licensee, the visitor must come for a purpose connected with the business in which the occupant is engaged, or which he permits to be carried on there. There must at least be some mutuality of interest in the subject to which the visitor's business relates, although the particular thing which is the object of the visit may not be for the benefit of the occupant." (Plummer v. Dill, 156 Mass. 426). The rule is approved in the recent cases of Norris v. Nawn Contracting Co. (206 Mass. 58); Stanwood v. Clancey (106 Me. 72); Purtell v. Philadelphia & R. Coal & Iron Co. (256 Ill. 110).
>
> * * *
>
> "If plaintiff had had no permission to come on the premises he would have been a trespasser. If

> he had been there by invitation or on lawful business of interest to both parties he would have been an invitee."

Bartels', J., theory, ~~a~~ party must be upon the premises under a contract for remuneration before such a party becomes an invitee as argued by him, is erroneous. Thus, the Supreme Court, Appellate Division, of New York, in applying the definition set forth in the *Heskell* case, made it clear that where parties are on a defendant's premises and only under an implied invitation, such persons are in no sense licensees but are invitees, and it is the duty of the owner of the premises to keep them in a reasonably safe condition. *Greenfield Hospital Association v. City of Schnectady*, 258 App. D.C. 352, 16 N.Y.S. 2d 729. In this case the Court held (p. 730):

> "The complaint was dismissed by the trial term at the close of the plaintiff's case. Plaintiff had shown that he entered the hospital of the defendant to visit a relative who was a patient there. While sitting in the patient's room he felt a bit sick and stepped out through a pair of screen doors on to a fire escape to get some fresh air. As plaintiff stepped on it, the platform of the fire escape came loose from the side of the building and plaintiff was precipitated on to the fire escape landing of the floor below.
>
> * * *
>
> The trial court dismissed the complaint upon the theory that the plaintiff was at best a bare licensee when he walked out on this fire escape and that to him the defendant owed no obligation other than to refrain from active negligence.
>
> When the plaintiff entered the hospital to visit his sick relative he was a business visitor, and invitee to whom the defendant owed a duty of

> maintaining the premises in a reasonably safe condition. Restatement of the Law of Torts, Secs. 322, 343; Johnson v. Staten Island Hospital, 265 N.Y. 658, 193 N.E. 432. This status continued at least until he went out on the fire escape.
>
> * * *
>
> It was error to hold as a matter of law that he was a bare licensee and dismiss the complaint.

The definition in the *Heskell* case of an invitee was reaffirmed in *Donohue* v. *Erie County Sav. Bank*, 258 App. Div. 1, 15 N.Y.S. 2d 689. In the *Donohue* case the Supreme Court of New York, Appellate Division, again points out the distinction between a trespasser (licensee) and an invitee and held (p. 691):

> "The Court of Appeals said, in the case of Vaughn v. Transit Development Co., 222 N.Y. 79, 118 N.E. 219: If plaintiff had no permission to come on the premises he would have been a trespasser. If he had been there by invitation or on lawful business of interest to both parties he would have been an invitee."

In *Franklin* v. *Maine Amusement Co.*, 175 A. 305, (Me. 1934), the Appellate Court reversed a directed verdict in favor of a proprietor of a theatre on the ground that an actor not employed by the proprietor, who fell while performing and injured himself on a damp, slippery stage, (the theory of the trial court being that such a plaintiff was not an invitee and hence assumed all risks for any dangerous conditions existing on the stage) ruled the actor was an invitee and held (p. 306):

> "The plaintiff was not an employee of the defendant. He was an independent contractor, an invitee."

In *Wello* v. *Union News Co.*, 263 App. Div. 328, 32 N.Y.S. 2d 943, the Supreme Court, Appellate Division, of New York, overruled a judgment of the trial court directing a verdict in favor of the defendant, the proprietor of a skating rink. Plaintiff (a skater) contended that she was injured because of the negligent way in which a ledge had been constructed near the hand railing of the rink. The trial court had directed a verdict on the theory that plaintiff, in skating on this rink, assumed the risks of injury. In reversing the Appellate Court held (p. 944):

> "* * * she did not assume the risk incidental to a dangerous structural condition in a place where she was an invitee. Renegar v. Barry, 279 N.Y. 605, 17 N.E. 2d 459."

Other Federal Courts in actions under the Tort Claims Act, (28 U.S.C.A., Sec. 1346) against the United States, have held that persons who go upon facilities owned by the United States under implied invitations to the public to visit such facilities, are not licensees or trespassers but are invitees and the United States owes such persons the duty of maintaining its properties in a reasonably safe condition.

In *Peets* v. *United States*, (U.S.D.C. S.D. Calif., 1958), 165 F. Supp. 177, an action was involved by a husband and wife to recover damages for personal injuries sustained by the wife who was injured on a visit to a facility of the United States, Fort Ord, California, where her son was stationed. Plaintiffs dined at the Post Exchange Cafeteria and while leaving the building the wife stepped off a ramp landing from the exit door to the sidewalk, which was not equipped with side rails, fell and was injured. Holtzoff,

J. entered judgment against the United States, found plaintiffs were invitees and held (pp. 180-181):

> "This brings us to a consideration of the principles of law that must govern the disposition of the issue of negligence. It is a general rule of the common law that a person who maintains a structure to which the public is invited is under an obligation to keep it in a reasonably safe condition. * * * To be sure, a person who operates a building to which the public is invited is not an insurer or a guarantor of the safety of every person who takes advantage of the implied invitation. On the other hand, he owes a duty to use reasonable care for the safety of those who respond to the invitation. As heretofore indicated in this instance, reasonable care was not used, and failure to use it constitutes negligence for which the defendant is liable. * * *.
>
> * * * it was incumbent upon the defendant to maintain the premises in a reasonably safe condition for use by invitees, and that the curb as constructed and maintained constituted a hazard to them."

A similar result was reached in *Avrutick* v. *United States*, (U.S.D.C. D.C. 1958), 164 F. Supp. 585. In applying the reasonable care doctrine to users of the park involved, i.e., invitees, and in entering judgment against the United States, Youngdahl, J. held (p. 587):

> "The court, therefore, finds that plaintiffs have proved by a fair preponderance of the evidence that there was a depression, caused by the lack of reasonable care on the part of the defendant in properly tamping the ground at that area which proximately caused male plaintiff's fall and the injury to his ankle, and that there was no contributory negligence or assumption of risk on male plaintiff's part."

On the erroneous theory that Petitioner was a licensee, that is, a trespasser under the law of New York, Bartels, J. because the Government offered testimony indicating that a polished dance floor is used for dancing *in night clubs* where certain precautions may be taken (A.A. 5) and that for some years before and after on other occasions the United States had waxed the stage at the Brooklyn Navy Yard, the limited duty owed by the United States to Petitioner had been "performed". (A.A. 9). This on the finding of Bartels, J. that "she was not in a position as such an invitee to say that she had a right to assume the risk" and therefore "cannot rely on any stage tradition to exculpate her from the consequences of her own choice, * * * as a licensee * * *, she was obliged to take or leave the premises 'as is'" (A.A. 10). The theory that the United States, because it maintained an admitted dangerous condition on the stage at the Brooklyn Navy Yard for two years previous to Petitioner's accident and two years subsequent to the accident, and other dancers had not been injured, relieves the United States from liability, (also predicated upon the erroneous finding that Petitioner is not an invitee) is contrary to the law of New York and Federal law as interpreted by the Court below. Thus, in *Kane* v. *Branch Motor Express Company*, (C.A. 2, 1961), 290 F. 2d 503, the Court below held, in dealing with similar contentions in regard to evidence dealing with general practice, even in an industry, on the theory that such practice (like the continued waxing of a stage by the United States) would relieve a defendant of liability when an accident occurs because of a dangerous condition, as not controlling and merely a yardstick to be considered along with other evidence in the case, be-

cause practice is not the sole test of "due care." In this regard the Court below held (p. 507):

> "Practice of the industry is not however the sole test of due care; it is merely a fair yardstick of the very least which all of those engaged in the trade must do. Under neither Federal law nor the law of New York is a defendant relieved of liability for damage done by him if he proves only that he has lived up to the usual measure of caution practiced in the industry."

The Court below reached a similar decision in *City of New York* v. *McAllister Brothers, Inc.*, (C.A. 2, 1962), 299 F. 2d 227 and held (pp. 228-229):

> "Respondent's argument against a finding of negligence is that the Navy represented that the Y.D. 209 was fit to pass under the bridge and that the tug, knowing of previous uneventful transits, was not justified in relying on this without more.
>
> * * *
>
> "It is not conclusive in respondent's favor that it and other tug owners may have conducted themselves in the past exactly as respondent did here. 'What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not.' Mr. Justice Holmes in Texas Pacific Ry. Co. v. Behymer, 189 U.S. 468, 470, 23 S.Ct. 622, 623, 47 L.Ed. 905 (1903). * * *"

In hazardous sports, participants are sometimes held to assume the risk of being injured when they engage in such sports for their pleasure. However, the doctrine is not applicable in a situation where one party negligently creates a hazardous condition and the other party learns of the condition, yet assents to endure this situation created by the negligence of

another, and makes a reasonable choice to carry on his work. The doctrine does not require a party like the Petitioner to abandon the reasonable course of her employment. Petitioner had a right to assume the risk of continuing her performance and this will not bar her recovery, just as Bartels, J. below held, when he stated (A.A. 7):

> "Again, if a defendant has a duty to a plaintiff which he has breached, the plaintiff's relationship to the defendant may be such that he has a right to assume the risk without being barred from recovery. Pomeroy v. Inhabitants of Westfield, 1891, 154 Mass. 462, 28 N.E. 899; cf., Paubel v. Hitz, 1936, 339 Mo. 274, 281, 96 S.W. 2d 369, 373."

In the *McEvoy* case cited by Bartels, J., the Court of Appeals refused to apply the doctrine of assumption of risk to a tenant in a one-family house adjoining a public sidewalk. A dangerous condition existed in the sidewalk which was known to the plaintiff. Plaintiff failed to notify the City of New York, as required by Statute, of this defect and after discovering it did not repair it, as required by law. Plaintiff recovered in the trial court because she was injured by a fall on the sidewalk. In affirming this judgment the Supreme Court, Appellate Division, of New York, held (p. 749):

> "The case was tried on the theory that the defendant was not negligent for the reason that the sidewalk was in good repair, or, if a defect existed in the sidewalk, that the plaintiff's negligence or lack of care in the manner in which she used the sidewalk contributed to the injury.
>
> * * *
>
> "It is admitted that for some time prior to the accident the plaintiff had knowledge of the defect in the sidewalk.
>
> * * *

> All of the evidence as to her knowledge of the defect and as to her appreciation of the dangers that might ensue, relates to a period prior to the time when she actually entered upon the risk; and although the jury might have found that she fully appreciated the extent of the risk at the time she entered upon the same, since that inference is neither conclusive nor irresistible, it cannot be held as a matter of law that she assumed the risk of her injury."

Similarly, in *Kaplan* v. *48th Ave. Corp.* (1943), 267 App. Div. 272, 45 N.Y.S. 2d 510, the Supreme Court, Appellate Division, of New York held (pp. 511-512):

> "Knowledge of the existence of a defect does not necessarily establish contributory negligence. Lehinsky v. Cohen, 262 App. Div. 775, 27 N.Y.S. 2d 865; Bailey v. Wagner, Whirler, & Derrick Corp., 266 App. Div. 875, 42 N.Y.S. 2d 829. One placed in the dilemma of abandoning the reasonable course of his work or assuming a risk will not be charged with contributory negligence as a matter of law if he adopts the latter alternative."

In affirming a judgment against the United States in *Grant* v. *United States*, (C.A. 2, 1959), 271 F.2d 651, the Court below held (pp. 653, 654-655):

> "The plaintiff sued to recover for personal injuries under the Federal Tort Claims Act, 28 U.S.C.A. Sec. 1346(b), suffered in a building owned and maintained by the United States for the use of the United States Merchant Marine Academy.
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> * * * * *
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> The holding below which imposed liability upon the United States must also be upheld. The law of the State of New York governs here. Ira S. Buskey & Sons, Inc. v. United States, 2 Cir., 172

F. 2d 447. It is clear that under such law the defendant owed business invitees, such as the plaintiff, 'the duty of exercising ordinary care to render the premises reasonably safe for the performance of the work.' Haefield v. Woodrich Engineering Co., 255 N.Y. 442, 175 N.E. 123, 125; Meiers v. Fred Koch Brewery, 229 N.Y. 10, 127 N.E. 491, 13 A.L.R. 633. Here, as well as in the Meiers case just cited, the defendant not only should have anticipated the use of premises in the evening and early morning hours, but its past behavior evidences a recognition, in the interest of safety, of the need for lighting. There clearly was a risk created by these unlit stairs in the dark early morning hours of January. Under these circumstances the question of whether the defendant had used ordinary care in rendering the premises reasonably safe was one of fact for the trier. Meiers v. Fred Koch Brewery, supra; Green v. Church of Immaculate Conception, 248 App. Div. 757, 288 N.Y.S. 769. There is nothing contrary to the ruling in Kimbar v. Estis, N.Y. 2d 339, 153 N.Y.S. 2d 197, 135 N.E. 2f 708, 710.

* * *

"It may be observed that '(o)ne placed in the dilemma of abandoning the reasonable course of his work or assuming a risk will not be charged with contributory negligence as a matter of law if he adopts the latter alternative.' Keplan v. 48th Ave. Corp., 267 App. Div. 272, 45 N.Y.S. 2d 510 512."

In *Povanda* v. *Powers* (1934), 272 N.Y.S. 621, 152 Misc. 75, the Supreme Court of New York held that a caddy did not assume the risk of being hit on the head by a golf ball notwithstanding that he was familiar with golf and its hazards.

To the same effect is *Eckert* v. *The Long Island Railroad Co.* (1871), 43 N.Y. 502. In the *Eckert* case the

Court of Appeals of New York in refusing to apply the doctrine of assumption of risk to a person who attempted to save a child from injuries.

In *Pomeroy* v. *Inhabitants of Westfield* (1891), 154 Mass. 462, 28 N.E. 899 (cited by Bartels, J. below), Homes, J. held plaintiff, a driver on a highway while attempting to continue his travel on a dark night, who was injured when his vehicle upset in a hole, could recover although the plaintiff knew that the highway was dangerous before he started over it.

In *Avrutick* v. *United States, supra*, Judge Youngdahl also held that persons playing in a park owned by the United States did not assume the risk of being injured when they fell in a depression in the park created by the United States. To the same effect is Judge Holtzoff's decision in *Peets* v. *United States, supra*.

II.

Petitioner Established That the United States Was Negligent and Caused Her, a U.S.O. Performer, to Fall and Injure Herself While Dancing. The Courts Below Improperly Construed New York Law and the Appellate Court Departed From Established Appellate Procedures in Affirming the Erroneous Action of the District Court.

But, as we have shown in our Statement of the case, the District Court found that Petitioner was not aware of the hazardous condition of the stage, which admittedly had been waxed and buffed earlier by the United States. That the waxing of this stage caused it to be slippery and dangerous was established by the undisputed evidence of Petitioner's expert witness Bogard, and Mr. and Mrs. Evers, who attended the dress rehearsal and performance at the Brooklyn Navy

Yard, and was ultimately admitted by the Government. The Government's Witness Libby testified that stages are never waxed for variety or professional shows. Thus, the waxing of the stage admittedly created a hazardous condition for dancers and both the District Court and the Court below so found Notwithstanding that the District Court did not find the Petitioner guilty of any contributory negligence, he barred a recovery on the erroneous theory that her obligations to continue the show after discovering that the stage was slippery was irrelevant because she was not an invitee, but was an uninvited licensee, i.e., a trespasser. Hence, Bartels, J. held, being a mere trespasser, Petitioner took the stage as she found it and the United States was under no duty to keep it in a safe condition.

Instead of following these findings of fact and reversing the District Court, because this finding of status was contrary to the law of the State of New York, the Court of Appeals held the District Court's judgment to be affirmed because "the United States was not negligent" and it made this erroneous finding in the face of its contrary finding that "negligence is based on the admitted fact that the stage floor had just been waxed earlier on the day of the performance and such condition was dangerous for acrobatic tap dancers". The basis of the Court of Appeals' decision is erroneous, contrary to law, and is improper because if that Court disagreed with findings of fact of the Trial Court, it should have remanded the case to that Court for additional findings. It is not the function of an Appellate Court in reviewing judgments under the Federal Tort Claims Act to make findings of fact contrary to those found in the District Court. An Ap-

pellate Court in such circumstances is required to accept the findings of the Court below if supported by substantial evidence. This manner of reviewing judgments of District Courts by Courts of Appeals should be corrected in the public interest.

Our quarrel with both Courts is that they have improperly applied the law of New York and the Federal law under the Tort Claims Act to the admitted facts and on the admitted facts Petitioner was entitled to recovery as she established the accident was caused by the Respondent's negligence and that she was not guilty of either contributory negligence or under the circumstances did not assume the risk of being injured because she was an invitee and not a trespasser.

In the interest of preserving the U.S.O. program for the entertainment of military personnel of Respondent, this Court should reverse the decisions below, hold U.S.O. performers invited to perform in military installations are not licensees or trespassers, but are invitees. To such invitees the United States owes the duty of furnishing such theatrical performers with reasonable facilities in which to perform for the benefit of the United States and if such patriotic performers, working without remuneration, are injured through the negligence of the United States in maintaining its facilities, they are entitled to recover damages therefor under the Federal Tort Claims Act. To affirm the erroneous decisions below might be the beginning of the end of the U.S.O. programs which provide entertainment to military personnel of Respondent on a non-remuneration basis.

CONCLUSION AND PRAYER

Wherefore, your Petitioner respectfully prays in this petition that this Honorable Court grant a Writ of Certiorari and bring before this Court the decision and judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

WARREN E. MAGEE
745 Shoreham Building
Washington 5, D. C.

LEE R. FENTON
160 Broadway
New York City, N. Y.

Attorneys for Petitioner

April 27, 1964

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 319—September Term, 1963.

(Argued January 29, 1964 Decided January 31, 1964.)

Docket No. 28359

LESLIE ANDRE EISENHOWER, a/k/a LESLIE ANDRE and LESLIE Y. FORD,

Plaintiff-Appellant,

—against—

UNITED STATES OF AMERICA,

Appellee.

Before:

LUMBARD, *Chief Judge,*

WATERMAN and MARSHALL, *Circuit Judges.*

Appeal from judgment of the United States District Court for the Eastern District of New York, dated May 14, 1963, John R. Bartels, J., dismissing plaintiff's complaint after trial on the merits. Affirmed.

WARREN E. MAGEE, Washington, D. C. (Lee R. Fenton, New York, N. Y., on the brief), *for Plaintiff-Appellant.*

CARL GOLDEN, Assistant United States Attorney (Joseph P. Hoey, United States Attorney for the Eastern District of New York, on the brief), *for Appellee.*

PER CURIAM:

Appellant, a professional acrobatic tap dancer and member of a troop of entertainers had invitational orders to proceed overseas on or about October 15, 1958 to entertain military personnel abroad. Two days prior to embarka-

tion, the troop requested and was given permission to give a final dress rehearsal at the U. S. Navy Receiving Station in Brooklyn, New York, which was attended by naval personnel. About 6:00 P. M. on the evening in question the entire troop arrived at the station's auditorium. An officer escorted them by the stage to the dressing rooms, took them to dinner and returned them to the performing area. The show started about 8:15 P. M. and appellant began her routine about 8:45. During her number, after thirty or more spins of acrobatic tap dancing, she fell and was injured. The suit was brought to recover damages from the United States under the Federal Tort Claims Act (28 U. S. C. A. § 1346) because of alleged negligence of the United States in not affording her a safe area on which to dance. The government denies any claim of negligence and asserts voluntary assumption of risk and contributory negligence. After trial without a jury, the court found for the defendant, and entered judgment dismissing the complaint on the merits. This appeal is taken from that judgment.

The claim of negligence is based on the admitted fact that the stage floor had just been waxed earlier on the day of the performance and such a condition was dangerous for acrobatic tap dancers. Whether appellant be considered a licensee or invitee the United States was not negligent. There is no evidence that anyone at the base knew that appellant was to perform as an acrobatic tap dancer or could reasonably have known that appellant would do a dance which required an unwaxed floor. Even more important, it is clear from the record that appellant was the one who knew that such a floor was dangerous, saw the condition of the floor two hours before the show started, did not ask anyone in authority to change the condition, did not refuse to do her act under these conditions and did not use the type of dancing shoes used by other acrobatic tap dancers who performed on waxed floors. The judgment is, therefore, affirmed.

Filed May 6, 1963

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK

60-C-932

May 6, 1963

LESLIE ANDRE EISENHOWER, a/a/a LESLIE ANDRE & LESLIE Y. FORD, *Plaintiff*,

—against—

UNITED STATES OF AMERICA, *Defendant*.

Appearances:

LEE R. FENTON, ESQ.
Attorney for Plaintiff
WARREN E. MAGEE, ESQ.
Of Counsel

JOSEPH P. HOEY, ESQ.
United States Attorney
Eastern District of New York
Attorney for Defendant
CARL GOLDEN, ESQ.
Assistant United States Attorney
Of Counsel

Opinion of Judge Bartels

BARTELS, D. J.:

This is an action under the Federal Tort Claims Act, 28 U. S. C. A. Sec. 1346, for personal injuries alleged to have been sustained by plaintiff on October 13, 1958, when, as a member of the Gypsy Markoff Troupe, she fell in the course of her performance as a tap dancer at the United States Navy Receiving Station, Brooklyn, New York. The Gypsy Markoff Troupe was engaged by the U.S.O. and invited by the Secretary of the Army to render certain performances to the military personnel abroad and received

invitational travel orders on October 10, 1958 to proceed on or about October 15, 1958 from New York to various European countries. Before embarking the Troupe requested an opportunity to give a dress rehearsal at the Brooklyn Navy Yard and permission was granted by the Commander of the Third Naval District.

Prior to October 13, 1958, plaintiff knew that she would appear at the United States Navy Receiving Station in Brooklyn but no contract was made with the defendant by either plaintiff or Gypsy Markoff before the arrival of the Troupe, with respect to the condition of the stage floor, and there was no contract or remuneration for this performance. When the members of the Troupe arrived about 6 P. M., they were escorted to the auditorium, where the stage was lit and the stage floor was in full view, and thereafter to dinner and to the back stage for the purpose of preparing for the performance. There was an opening number about 8:15 P. M., in which all members of the Troupe, including the plaintiff, appeared in a chorus-line arrangement in street shoes; thereafter there were individual performances including a Charleston dance. Plaintiff appeared at or near the last number about half an hour after the opening number, wearing leather soled tap dance shoes with aluminum plates on the tips and on the heels. Her dance was in the nature of an acrobatic tap dance involving dancing, ballet swings and acrobatic stunts. After she had begun to dance and had completed about thirty or thirty-two spins, she realized that the floor was too slippery and accordingly tried to "ad-lib." Thereafter she slipped and fell. She then arose, continued her act and made another appearance in the grand finale. She now claims that she sustained serious injuries from this fall.

Plaintiff contends that the stage floor was entirely too slippery for tap dancing; that it was negligence on the part of the defendant to wax the stage floor to make it so slippery in view of this type of performance, and that

no stage floor upon which tap dancing is performed, is ever waxed or polished. She claims that after the opening number she saw that the floor was too slippery and she was afraid she might fall. She said she then spoke to one of the uniformed men in the wings who was acting as a stagehand, requesting that the stage floor be mopped with cold water to remove the danger before her number but that nothing was done. However, she did not speak to Lieutenant Bessie Bryant who apparently was in charge of the auditorium. Moreover, two witnesses on behalf of the Government were produced, who denied that any such request was ever made and testified that this stage floor had been prepared and waxed in the same manner for two years previous and two years subsequent to the accident, during which period tap dancers had appeared thereon both before and after plaintiff's accident, without any mishap. Upon examination plaintiff admitted that she had danced on this stage floor a long time before but could not remember how long ago. The Government also introduced evidence showing that tap dancing is performed regularly on polished dance floors and in night clubs, and that rubber soles are used on tap dance shoes if there is any question of danger arising from dancing on polished floors, and that resin is sometimes employed by tap dancers where floors are deemed slippery.

II.

In its pleading the defendant denies negligence and raised an affirmative defense of assumption of risk. Much confusion, as well as considerable unpointed debate, has been engendered by the defense of assumption of risk.[1] This doctrine may be invoked under two different sets of circumstances: (1) where defendant had no duty to plaintiff,

[1] Where one expressly assumes the risk he consents to the conduct of the defendant and is not entitled to recover. See Restatement, Torts, Sec. 892 (1934). It is the implied assumption of risk that poses the question.

in which case plaintiff's assumption of risk is simply a counterpart of the defendant's lack of duty, and (ii) where defendant has a duty to plaintiff but has breached this duty and plaintiff, with full knowledge thereof voluntarily and deliberately assumes the risk of this breach.[2] In the latter case plaintiff may recover even though he assumed the risk, provided his assumption of the risk was reasonable under the circumstances; however, if such assumption of risk is unreasonable, he may not recover.[3] In this category the assumption of risk doctrine often overlapses the theory of contributory negligence.[4] It has been contended by some that there is no such defense of implied assumption of risk inasmuch as this phrase simply describes either no duty on the part of the defendant or contributory negligence on the part of the plaintiff.[4] To litigants themselves the theory of recovery may be simply a matter of emphasis or semantics since they are interested only in the proper result; but there is a difference. If the issue is one of contributory negligence, then the burden of proof, at least in New York, is upon the plaintiff and in cases involving comparative negligence, the contributory negligence simply reduces, but does not bar, recovery; whereas if the defense is one of assumption of risk, then the burden of proof is upon the defendant.

Contributory negligence is based upon an objective test. Assumption of risk embraces not only knowledge of the physical condition and appreciation of the danger produced thereby, but also a voluntary choice to proceed. See *McEvoy v. City of New York*, 1943, 42 N.Y.S. 2d 746, 266

[2] 2 Harper and James, The Law of Torts, Sec. 21.1 (1956); Restatement (Second), Torts, Notes, Sec. 893, pages 70-106 (Tentative Draft No. 9, 1963).

[3] 2 Harper and James, The Law of Torts, Sec. 21.1, pages 1165-1168 (1956).

[4] See Restatement (Second), Torts, Notes, Sec. 893, pages 70-87 (Tentative Draft No. 9, 1963).

App. Div. 445. If plaintiff has a choice of doing or not doing the act and voluntarily chooses to do the act, which involves known hazards, then the consequences are of his own choosing. *Scala* v. *City of New York*, 1951, 200 Misc. 475, 102 N.Y.S. 2d 790.

There are some risks which a plaintiff may assume but the assumption may not be voluntary. Such is not the case here. Again, if a defendant has a duty to a plaintiff which he has breached, the plaintiff's relationship to the defendant may be such that he has a right to assume the risk, without being barred from recovery.[*] *Pomeroy* v. *Inhabitants of Westfield*, 1891, 154 Mass. 462, 28 N. E. 899; *cf.*, *Paubel* v. *Hitz*, 1936, 339 Mo. 274, 281, 96 S. W. 2d 369, 373. To a licensee a defendant owes only a limited duty and the plaintiff takes the risk of obvious and known dangers present upon the premises although the defendant must advise him of all latent defects. However, if plaintiff is an invitee, the defendant has an affirmative duty to provide reasonably safe premises or to acquaint the plaintiff with any unreasonably dangerous condition that may exist thereon and to refrain from active conduct which is foreseeable and unreasonably dangerous to plaintiff.[*] The key to the solution depends upon the relationship between the parties.

There has been some question in this case as to whether the plaintiff was an invitee or a licensee. The burden is upon the plaintiff to establish the nature of her relationship with the defendant if she relies upon the position of an invitee.

Assuming the plaintiff in this case was an invitee, it would be the duty of the defendant to provide a reasonably

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[*] See 2 Harper and James, The Law of Torts, Sec. 27.1 (1956). Persons such as tenants in an apartment house and travelers upon sidewalks who have a right to be present upon the possessor's premises without his consent, have superior rights to those of an ordinary invitee on private premises. See Restatement, Torts, Sec. 345 (1934); *Paubel* v. *Hitz*, *supra*.

safe place for the Troupe to perform a customary type of show or to acquaint the plaintiff with the existence of any unreasonably dangerous condition which would interfere with that type of performance. The Government, however, would not be an insurer of the premises.[6] If this was not the customary type of show but included some specialty which required the stage floor to be in a certain condition for safety purposes, then it would be necessary to charge the defendant with notice of this fact, either actually or constructively, before the defendant would be obligated to acquaint the plaintiff with the fact that the stage floor would not be in that condition.[7] The tap dance performed by the plaintiff was one that was performed with metal soles and heels. Testimony was adduced on behalf of the plaintiff that stage floors were generally unpolished and that a polished stage floor was an unsafe place for the performance of a tap dance number.[8] But there was no testimony indicating that the defendant was at any time notified that a tap dance would be performed upon this stage. On the other hand, the defendant offered testimony indicating that a polished dance floor is a reasonably safe place for a tap dance inasmuch as such performances often occur on dance floors and in night clubs and, further, that when such a polished surface is not deemed a safe place for tap dancing, rubber soles and/or resin are generally used to provide the necessary safety.

[6] See Annot., 63 A.L.R. 2d 591, 597 (1959).

[7] After giving such notice there would be no obligation on the part of the defendant to furnish an unpolished stage floor to the plaintiff, who was an invitee. Restatement, Torts, Sec. 343(c) (ii) (1934); but see 2 Harper and James, The Law of Torts, Sec. 27.13 (1956).

[8] With respect to ordinary ballroom dance floors, it has been held that to facilitate their proper use, it is customary to wax them in order to make them slippery and that plaintiff, with knowledge of this condition, assumes the risk of slipping. *Fishman* v. *Brooklyn Jewish Center, Inc.*, 234 App. Div. 319, 253 N.Y.S. 124 (1932).

Based upon the evidence and the applicable principles of law, the Court finds that the Government had no duty under the circumstances to provide an unpolished stage floor for the plaintiff's tap dance number since (i) it was not notified in advance and it had no reason to expect that such a number would be performed; and (ii) even if it could be charged with such notice, the plaintiff has failed to sustain the burden of proof that a polished floor would be unsuitable or reasonably unsafe for such a performance. The state platform, as provided by the defendant, had been proven safe for performances theretofore and thereafter given, including tap dancing, and also for the performances given by the other members of the plaintiff's own troupe. Upon all those occasions the floor had been prepared in the same manner. Since the Court finds that the defendant performed its duty to the plaintiff, it need go no further.

Plaintiff, however, insists that she had a right and, indeed, a duty to assume the risk by reason of the ethics of her profession as reflected in the maxim "the show must go on." Admittedly, plaintiff had an opportunity to and did see the condition of the polished floor about half an hour before her performance and fully appreciated the dangers, if any existed, in connection therewith. She had no right to be on this stage floor except with the consent of the defendant; consequently she was not in a position as such an invitee to say that she had a right to assume the risk. She cannot rely upon any stage tradition to exculpate her from the consequences of her own choice if such tradition contradicts the legal principles applicable. Whether the plaintiff's assumption of the risk was reasonable or unreasonable was immaterial under the circumstances.

Finally, it should be noted that the testimony in reality indicated that the plaintiff was a licensee rather than an invitee. The Gypsy Markoff Troupe requested permission

to use the Government's premises as an accommodation for a dress rehearsal. It rendered its performance under permission and not by invitation of the Government or pursuant to any contract with the Government. It is true that the military personnel at the Base witnessed the performance but this apparently was only an incident to the permission. As a licensee there is no question that plaintiff was obliged to take or leave the premises "as is" except for latent defects,[*] concerning which it would have been the Government's duty to advise the plaintiff. There is no claim that there were any latent defects upon the stage floor. The Government's obligation to the plaintiff was therefore fully performed.

The above constitutes the Court's findings of fact and conclusions of law. Settle order within ten (10) days on two (2) days' notice.

JOHN R. BARTELS
United States District Judge

[*] "(A) social guest, having the status of a licensee, must take the premises as he finds them, and he is entitled to no greater protection than the members of the family." *Krause* v. *Alper*, 1958, 4 N.Y. 2d 518, 520, 176 N.Y.S. 2d 349, 351.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York on the thirty-first day of January, One Thousand Nine Hundred Sixty-four.

Present: Hon. J. Edward Lumbard,
Chief Judge
Hon. Sterry R. Waterman
Hon. Thurgood Marshall
Circuit Judges

LESLIE ANDRE EISENHOWER, a/k/a LESLIE ANDRE and LESLIE Y. FORD, *Plaintiff-Appellant*

v.

UNITED STATES OF AMERICA, *Defendant-Appellee*

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed with costs to the appellee.

(s) A. DANIEL FUSARO
Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1057

LESLIE ANDRE EISENHOWER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, a professional acrobatic tap dancer, sued under the Federal Tort Claims Act, 28 U.S.C. 1346, for personal injuries sustained when she fell in the course of giving a performance at a Navy base. She alleged that the United States had negligently furnished her a waxed floor on which to dance. The district court held that the United States was not negligent: (1) because it had no reason to expect that a dance such as petitioner's would be performed;

and (2) because petitioner had not shown, in any event, that a waxed floor was unsafe for her performance (Pet. App. 9a). The court of appeals affirmed.

This case involves only factual questions arising under State law.* There is, accordingly, no occasion for further review by this Court.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

JUNE 1964

* The decisions below do not turn, as petitioner contends, on a misinterpretation of State law as to the differences between a licensee and an invitee. Both courts below held squarely that the government exercised all care that it is required to accord an invitee.

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